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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
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11 FERNANDO DELGADO,

12 Petitioner,

13 v.

14 RAYMOND MADDEN, Warden,

15 Respondent.  
16

Case No. 2:18-cv-02699-FMO-MAA

**ORDER ACCEPTING REPORT  
AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE  
JUDGE**

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended  
18 Petition, the other records on file herein, and the Report and Recommendation of  
19 the United States Magistrate Judge.

20 The Court also has reviewed Petitioner's objections to the Report and  
21 Recommendation, which the Court received and filed on June 18, 2020  
22 ("Objections"). (Objs., ECF No. 22.) As required by Federal Rule of Civil  
23 Procedure 72(b)(3), the Court has engaged in de novo review of the portions of the  
24 Report and Recommendation to which Petitioner specifically has objected.

25 **I. Ground One**

26 As to Ground One of the First Amended Petition, Petitioner argues in his  
27 Objections that the Magistrate Judge erred in concluding that the state court's  
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1 harmless error analysis was not objectively unreasonable. (Objs., at 2–5.)  
2 Specifically, Petitioner argues that because Detective Guillen is a law enforcement  
3 officer, his testimony likely was accorded greater weight than the other evidence  
4 regarding Augustine’s encounter with the Mariana Maravilla gang members. (*Id.*)  
5 Thus, according to Petitioner, the admission of Detective Guillen’s testimony  
6 regarding Augustine’s statements was not harmless. (*Id.*)

7 The Court has conducted an independent review of the state court’s decision,  
8 which held that the trial court’s admission of Detective Guillen’s testimony  
9 regarding Augustine’s statements was harmless error under the standard set forth in  
10 *Chapman v. California*, 386 U.S. 18 (1967). (Lodged Document (“LD”) No. 8,  
11 ECF No. 13-13, at 15–17.) The Court concurs with the Magistrate Judge’s  
12 conclusion that the state court’s decision is not objectively unreasonable. *See*  
13 *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (“[A] a state prisoner must show  
14 that the state court’s ruling on the claim being presented in federal court was so  
15 lacking in justification that there was an error well understood and comprehended  
16 in existing law beyond any possibility for fairminded disagreement.”) As the state  
17 court and Magistrate Judge reasoned, Detective Guillen’s opinion that Petitioner  
18 acted on behalf of the Mariana Maravilla gang was also supported by his  
19 professional experience and knowledge of the Mariana Maravilla gang’s activities,  
20 as well as testimony from Alicia and Petitioner regarding the incident between  
21 Augustine and the gang members. (*See* R&R, ECF No. 21, at 25; LD 8, at 17).

22 The Court also concurs with the Magistrate Judge’s conclusion that Petitioner  
23 has failed to show that the introduction of Augustine’s statements had a “substantial  
24 and injurious effect or influence in determining the jury’s verdict”—the harmless  
25 error standard that applies on collateral review. *Brecht v. Abrahamson*, 507 U.S.  
26 619, 637 (1993). Petitioner’s arguments that the jury would not have credited  
27 Alicia’s testimony, and that he would not have testified about the incident with  
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1 Augustine but for Detective Guillen’s testimony, are too speculative to warrant  
2 relief. *See Morales v. Woodford*, 388 F.3d 1159, 1173 (9th Cir. 2003) (“Mere  
3 speculation is insufficient to grant the writ under *Brecht* . . .”).

## 4 5 **II. Ground Two**

6 As to Ground Two, Petitioner argues in his Objections that the Magistrate  
7 Judge overlooked the California Supreme Court’s recent decision in *People v.*  
8 *Canizales*, 7 Cal. 5th 591 (2019), which limits the use of the “kill zone” theory jury  
9 instruction. (Objs., at 6.) He argues that under *Canizales*, the use of the “kill zone”  
10 instruction in his case was prejudicial; and therefore, the state court’s harmless error  
11 analysis was objectively unreasonable. (*Id.*, at 5–9.)

12 The Magistrate Judge acknowledged *Canizales* and thus declined to reach  
13 Respondent’s argument that the “kill zone” instruction was proper in this case.  
14 (R&R, at 32–33). Although *Canizales* held that the use of a “kill zone” instruction  
15 in that case was prejudicial, this state court decision does not affect the federal  
16 harmless error standard, which is governed by *Chapman*. In light of the evidence  
17 presented at trial—Christopher and Alicia’s testimony that Petitioner shot at  
18 everyone in the group and that Christopher was directly in the line of fire before  
19 successfully taking cover (*see* 2 Reporter’s Transcript (“RT”) 334–35, 373–76,  
20 427–28, 431), and the evidence of Petitioner’s gang-related motive for killing  
21 everyone in the group (*see* 2 RT 450–53, 485–88; 3 RT 710–12; 4 RT 1040, 1052–  
22 55), this Court concurs with the Magistrate Judge’s conclusion that the state court’s  
23 harmless error analysis was not an objectively unreasonable application of  
24 *Chapman*.

25 In sum, the Court concurs with and accepts the findings, conclusions, and  
26 recommendations of the United States Magistrate Judge, and overrules the  
27 Objections.  
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1 IT THEREFORE IS ORDERED that (1) the Report and Recommendation of  
2 the Magistrate Judge is accepted; and (2) Judgment shall be entered denying the  
3 Petition and dismissing this action with prejudice.

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5 DATED: August 21, 2020

6 /s/

7 FERNANDO M. OLGUIN  
8 UNITED STATES DISTRICT JUDGE  
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